Office-Supreme Court, U.S.
FILED
DEC 5 1966
JOHN F. DAVIS, CLERK

PETITION FOR CERTIORARI

No. 832

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1966

JAMAICA TIME PETROLEUM, INC.,

Petitioner,

vs.

FEDERAL INSURANCE COMPANY,

Respondent.

ON PETITION
FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE
TENTH CIRCUIT

M. LEWIS LEHMAN
By PAUL KALLMAN
4307 Crenshaw Boulevard
Los Angeles, Calif. 90008

Attorneys for Petitioner

ASSOCIATE COUNSEL
RALPH R. FRANK
PAUL KALLMAN
9460 Wilshire Boulevard
Suite 427
Beverly Hills, California

Attorneys for Petitioner

BLANK

PAGE

SUBJECT INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement	5
Reasons For Granting The Writ	9
I. The Payment of Excessive Witness Fees to a Non-Expert Witness, Amenable to Process, Who Gives Highly Prejudicial Testimony, Results in a Denial of Due Process of Law.	9
A. Due Process of Law	9
B. Witnesses Duty to Testify	10
C. Effects of the Payment of Excessive Compensation to a Non-Expert Witness	12
II. The Massive and Prejudicial Pre-Trial Publicity Attending Petitioners Case Prevented Him From Receiving A Fair Trial Consistent With The Due Process Clause Of The Fourteenth Amendment	15
Conclusion	16
Appendix A - Opinion Below	A-1

Appendix B - Judgments Below B-1

(1) Original Judgment of Trial Court

(2) Original Judgment of United States District Court of Appeals for the Ninth Circuit B-2

TABLE OF AUTHORITIES CITED

Cases

Alexander v. Watson, 128 F. 2d 627 12

Blackburn v. Alabama, 361 U. S. 199, 4 L. Ed. 2d 242, 80 S. Ct. 274 10

Clifford v. Hughes, 139 App. Div. 730, 124 N. Y. S. 478 14

Dodge v. Stiles, 26 Conn. 463 14

Dorr v. Camden, 55 W. Va. 226, 46 S. E. 1014, 65 L. R. A. 348 14

International Shoe Company v. Washington, 326 U. S. 310, 90 L. Ed. 95, 66 S. Ct. 154, 161 A. L. R. 1057 9

Irvan v. Dowd, 366 U. S. 717, 6 L. Ed. 2d 751, 81 S. Ct. 1639 10

Jamaica Time Petroleum, Inc. v. Federal Insurance Co. 366 F. 2d 156 (10th Cir. 1966) 1

Kinsella v. United States, 361 U. S. 234, 4 L. Ed. 2d 268, 80 S. Ct. 297 10

In re Ramschasel's Estate, 24 Pa. Super. 262 14

Right v. Somers, 125 Ill. App. 256 12

Sheppard v. Maxwell, Warden 384 U. S., part 2, 333 15, 16

State ex rel. Spillman v. First Bank of Dickerson, 114 Neb. 423, 207 N. W. 674, 45 A. L. R. 1418 13

Ullman v. United States, 350 U. S. 422, 100 L. Ed. 511, 76 S. Ct. 497, Reh. Den. 351 U. S. 928, 100 L. Ed. 1457, 76 S. Ct. 777 11

United States v. Bryan, 339 U. S. 323, 94 L. Ed. 84, 70 S. Ct. 724, Reh. Den. 339 U. S. 991, 94 L. Ed. 1391, 70 S. Ct. 1081 11

Constitution

United States Constitution, 14th Amendment 15, 16

Statutes

Kansas Statutes, K. S. A.
60-243 3
60-407 3, 4
60-420 3, 4

Title 28, U. S. C. §1254(1) 2

Rules and Regulations

Federal Rules of Civil Procedure, Rule 43(a) 3

24 F. R. D. 331 12

24 F. R. D. 341 12

Texts and Miscellaneous

58 American Jurisprudence §29, p. 38	11
30 L.R.A. N.S., 278 N. 280	14
Restatement of Contracts, §552	12

BLANK

PAGE

PETITION FOR CERTIORARI

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1966
No. _____

JAMAICA TIME PETROLEUM, INC.,

Petitioner,

vs.

FEDERAL INSURANCE COMPANY,

Respondent.

ON PETITION FOR A
WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF THE
UNITED STATES FOR THE TENTH CIRCUIT

JAMAICA TIME PETROLEUM, INC., your Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above-entitled case on September 7, 1966.

OPINIONS BELOW

There was no formal opinion of the United States District Court for the District of Kansas. The opinion of the Court below in this case (Appendix "A" infra, p. A-1) is reported at 366 F. 2d 156.

JURISDICTION

The judgment of the United States Court of Appeals, Tenth Circuit, was entered on September 7, 1966. The jurisdiction of this Court is invoked under the provisions of 28 U. S. Code, Subsection 1254(1).

QUESTIONS PRESENTED

1. Did Petitioner receive, and could it have received, a fair trial, consistent with modern concepts of due process, in an action for breach of a fire insurance contract affirmatively defended on the grounds of (1) fraud in the inducement and (2) arson, where the chief and most vital witness for the defense admitted the arson and was an habitual criminal who was paid excessive ($1000.00) witness fees to so testify?

2. Was such a witness competent to testify?

3. After such evidence was given and received, was not Petitioner entitled to a jury instruction, "that the law does not authorize the payment to law witnesses in excess of ordinary witness fees, and if a witness has been so paid, that fact may be considered in determining the weight and credit to be given to his testimony"?

4. Did the Petitioner receive a fair trial consistent with modern concepts of due process in light of the pretrial newspaper publicity given to the case?

5. Did the Courts Below so far depart, and sanction such departure in this case, from the accepted and usual course of judicial proceedings?

STATUTES INVOLVED

Rule 43(a) of the Federal Rules of Civil Procedure and Kansas Statutes K. S. A. 60-243, 60-407, and 60-420 respectively, provide as follows:

> "All evidence shall be admitted which is admissible under the Statutes of the United States, or under the rules of evidence heretofore applied in the Courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made. The competency of a witness to testify shall be determined in like manner."
>
> Rule 43(a) of the Federal Rules of Civil Procedure.

"EVIDENCE.

"(a) FORM AND ADMISSIBILITY. In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by this Article. All evidence shall be admitted which is admissible under the specific statutes or articles for this chapter. The competency of witnesses to testify shall be determined in like manner."

K. S. A. 60-243.

"GENERAL ABOLITION OF DISQUALIFICATIONS AND PRIVILEGES OF WITNESSES, AND OF EXCLUSIONARY RULES.

"Except as provided by Statute (a) every person is qualified to be a witness, and (b) no person has a privilege to refuse to be a witness, and (c) no person is qualified to testify to any matter, and (d) no person has the privilege to refuse to disclose any matter or to produce any object or writing, and (e) no person has a privilege that another shall not be a witness or shall not disclose any matter or shall not produce any object or writing, and (f) all relevant evidence is admissible."

K. S. A. 60-407.

"EVIDENCE GENERALLY AFFECTING CREDIBILITY.

"Subject to Section 60-421 and 60-422, for the purpose of impairing or supporting the credibility of a witness, any party including the party calling him may examine him and introduce extrinsic evidence concerning any conduct by him and any other matter relevant upon the issues of credibility."

K. S. A. 60-420.

STATEMENT

Petitioner corporation (Plaintiff and Appellant in the Courts Below) initially brought this action against the respondent insurance company (Defendant and Appellee in the Courts Below) in the District Court of Sedgwick County, State of Kansas. On respondent's petition for removal, on grounds of diversity of citizenship, the case was remanded to the Federal District Court for the District of Kansas.

On April 19, 1962, an aircraft belonging to the Petitioner was completely destroyed by fire. Petitioner brought this action to recover $100,000.00 on the fire insurance policy issued by the respondent insurance company insuring said aircraft.

Trial of the lawsuit commenced on January 25, 1965, before the Honorable Wesley E. Brown and was concluded by a jury verdict and judgment thereon in favor of the respondent on the evening of February 2, 1965. Respondent asserted two defenses to Petitioner's claim, fraud in the inducement and arson, arising out of alleged acts of petitioner's president, Rudolph R. Greenbaum, in procuring the aircraft's destruction for purposes of collecting the said insurance.

The jury found in answer to special interrogatories (1) "Did the plaintiff corporation, through its president, fraudulently over-state the value of the aircraft involved and thereby induce defendant to issue the policy in question?", (2) "Was the aircraft in question intentionally and deliberately destroyed?", and (3) "Did the plaintiff corporation, through its president, arrange for and procure the deliberate destruction of its aircraft for the purpose of collecting the insurance on the aircraft?", that petitioner

was not guilty of fraud, but did, through its president, procure said aircraft's intentional destruction.

The plane involved was a Lockheed Lodestar which was manufactured for the military during World War II. In February, 1962, petitioner bought the plane for the sum of $13,500.00, including valuable spare parts. The initial asking price for the aircraft was $49,000.00 but the Seller had no success in selling it at that figure.

Prior to the bringing of the aircraft to Wichita, Mr. Greenbaum called one James Hill to acquire insurance on the plane. Mr. Hill was an insurance agent in Wichita who placed his airplane insurance with respondent insurance company. Petitioner owned another Lockheed Lodestar and the insurance on it was also carried with the respondent. The other Lodestar aircraft cost $37,000.00 and was insured for $125,000.00 with the knowledge of Mr. Hill.

When Mr. Greenbaum called Mr. Hill about the insurance on the new plane either Mr. Hill or Mr. Greenbaum suggested that the amount be $100,000.00. There was no discussion of the purchase price. The respondent company issued the policy in that amount. The respondent had previously insured the same aircraft for Manufacturer's Hanover Trust Company of New York, its prior owner, in the amount of $99,300.00. Said policy was known as a Stated Amount Policy having no relation to the purchase price. The reason for insuring the aircraft for an amount in excess of its purchase price is that the aircraft has long been out of manufacture and if, for instance, a wing or part is destroyed, said destroyed part has to be custom made at a tremendous expense.

There is no dispute that the plane was

completely destroyed by fire. There was a dispute in the trial court on the cause of the fire. The respondent contends that the fire was deliberately set and that petitioner's president hired it to be done. Petitioner contends that the fire was accidental, and, that even if it were not, petitioner was not connected with the burning.

Petitioner contended that it was a gasoline explosion in the aircraft itself. A professor of chemical engineering for the University of Kansas testified as an expert to this effect. Respondent's theory is that it was an intentional dynamite explosion and respondent produced experts who testified that the plane's destruction was so caused.

Respondent produced direct evidence as to the cause of the explosion. One Rex Conn testified that he personally placed and lighted the dynamite charge. The testimony of the witness Conn, as the Opinion of the Appellate Court Below states, "... is essential to the insurer's case."

Rex Conn testified in substance that one George Poulos propositioned him to burn the aircraft and promised him the sum of $1,500.00 if the aircraft was completely destroyed. Conn further testified that Poulos told Conn that Poulos was hired to destroy the plane and told Conn who hired Poulos to burn it. Prior to the trial, during the trial and after the trial, your Petitioner objected to the testimony of Rex Conn on the ground that Conn was paid $1,000.00 to testify by the respondent and on the ground of hearsay. The respondent had, for many months after the fire, been trying to develop evidence that there was arson. Rex Conn had been questioned by various people and had denied any connection with the burning of the plane. In

February, 1963, almost a year after the fire, Rex Conn was visited at the Kansas penitentiary by Mr. Rundle, trial counsel for the respondent below, and George Robinson, an investigator for the respondent. Rex Conn was then serving a ten to thirty year habitual criminal sentence arising out of a car theft charge. At that time they offered to pay Conn $1,000.00 if he would testify at the trial. Respondents refer to it as a "reward". There was, however, no public offer of a reward nor was anyone of respondent's ten other witnesses offered a "reward" except Rex Conn. The $1,000.00 was delivered to Rex Conn's mother. It was only after Rex Conn was visited in the penitentiary by Mr. Rundle and Mr. Robinson and offered the $1,000.00 that he admitted being involved in the arson. (He knew of the pending litigation).

In addition, Rex Conn had reason to hope he would receive a reduction in sentence if he testified. He had threatened to "get" George Poulos and was successful. (George Poulos was subsequently convicted of arson for the destruction of the subject aircraft in the District Court of Sedgwick County, State of Kansas. Rex Conn plead guilty to the same offense at said trial. Rex Conn admits that when he plead guilty he was told that the sentence for arson would try to run concurrently with his sentence as an habitual criminal. Subsequently Conn's sentencing for arson was made to run concurrently.)

Because of the payment to Conn to testify and the other above-mentioned matters, petitioner continually moved before the trial, at the trial and after the trial that Rex Conn be precluded from testifying. The effect of his testimony was so prejudicial and damaging to the petitioner's cause that it nullified all evidence of the petitioner and deprived the petitioner of a fair trial consistent with modern concepts of due

process.

Prior to the subject trial, there was considerable newspaper coverage of the case to the effect that the president of the petitioner corporation procured the intentional burning of the subject aircraft. The newspaper coverage was so broad, pervasive and prejudicial that it further deprived the petitioner of a fair trial consistent with modern concepts of due process.

REASONS FOR GRANTING THE WRIT

I.

THE PAYMENT OF EXCESSIVE WITNESS FEES TO A NON-EXPERT WITNESS, AMENABLE TO PROCESS, WHO GIVES HIGHLY PREJUDICIAL TESTIMONY, RESULTS IN A DENIAL OF DUE PROCESS OF LAW.

It is petitioners' contention that the payment to witness Conn of excessive witness fees perverted justice in that it caused witness Conn to give perjured testimony which thereby resulted in a denial of due process of law to the Petitioner.

A. Due Process of Law

The Due Process clause has as its purpose the insuring of the fair and orderly administration of the laws.

International Shoe Company v. Washington, 326 U. S. 310, 90 L. Ed. 95, 66 S. Ct. 154,

Due process has to do with the denial of fundamental fairness, shocking to the universal sense of justice; it deals neither with power nor with jurisdiction, but with their exercise.

Kinsella v. United States, 361 U. S. 234, 4 L. Ed. 2d 268, 80 S. Ct. 297.

Due process, in terms of a judicial hearing, means the proceeding or hearing must be appropriate, fair, adequate, and such as is practical and reasonable in the particular case. The failure to afford an accused a fair hearing violates even the minimal standards of due process.

Irvan v. Dowd, 366 U. S. 717, 6 L. Ed. 2d 751, 81 S. Ct. 1639.

The due process clause of the 14th Amendment forbids fundamental unfairness in the use of evidence, whether true or false.

Blackburn v. Alabama, 361 U. S. 199, 4 L. Ed. 2d 242, 80 S. Ct. 274.

Petitioner contends, as set forth below, that the use of witness Conn's testimony under the circumstances, was fundamentally unfair and shocking to the universal sense of justice, and therefore, petitioner was denied a fair trial.

B. Witnesses Duty To Testify.

Witnesses owe a duty to the State to aid in the due administration of the government for such compensation as the law provides, and they may be compelled to appear and testify, even though the statute makes no provision for

compensation. It is a general rule that aside from certain well-defined exceptions and qualifications, every competent person may be compelled to bear testimony in the administration of the laws by the duly constituted courts of the country. It is the inherent power of the court of justice, within the sphere of its jurisdiction to compel witnesses to appear before it and testify concerning any relevant facts within their knowledge in a case then pending in court.

58 American Jurisprudence, subsection 29, page 38.

This court recognized the subject principal in handing down the decisions in United States v. Bryan, 339 U. S. 323, 94 L. Ed. 84, 70 S. Ct. 724, Reh. Den. 339 U. S. 991, 94 L. Ed. 1391, 70 S. Ct. 1081, and Ullman v. United States, 350 U. S. 422, 100 L. Ed. 511, 76 S. Ct. 497, Reh. Den. 351 U. S. 928, 100 L. Ed. 1457, 76 S. Ct. 777.

Petitioner contends that witness Conn had a duty to testify without the payment of excessive fees. He was amenable to process. Respondent's contention that the $1,000. payment was a reward is patently erroneous. There was no public offer of reward, nor was any one of respondent's ten other witnesses offered a "reward". It was only after witness Conn received the $1,000 fee which respondents euphimistically refer to as a reward, that he admitted being involved in the arson. Respondents, in calling the $1,000.00 fee a "reward", would have this court believe that by merely placing a sign with the word "Horse" imprinted thereon, on a cow, will change the cow to a horse.

C. Effects Of The Payment Of Excessive Compensation To A Non-Expert Witness.

There are no cases directly in point holding that the payment to a non-expert witness of excessive witness fees results in a denial of due process in the ensuing trial. There are, however, numerous State cases and one Federal case holding that a contract to pay a witness amenable to process more than regular fees is non-enforceable for want of consideration and void because such a contract offers enticement to perjury, tends to pervert the course of justice, and therefore, is contrary to public policy. The reasoning and significance of such cases is applicable to the case at bar. There is no federal uniform rule with respect to this subject; only two articles in general, speak of the need of uniformity for rules of evidence in the Federal Courts. Please see 24 F. R. D. 331, and 24 F. R. D. 341.

The Restatements of Contracts, subsection 552, holds that a bargain to pay a witness, who is amenable to process, additional or contingent compensation is void for the reason that the witness is already under a legal duty to give his testimony and the witness' promise to appear and testify is therefore not sufficient consideration.

More importantly, the cases hold that such a contract invites perjury and tends to pervert the course of justice.

Alexander v. Watson, 128 F. 2d 627.

In Right v. Somers, 125 Ill. App. 256, a case dealing with a contract to pay a fact witness for his loss of time the court said on p. 257,

"If a witness, who knows a fact material to the issue in the cause, either before or after the service of a subpoena upon him, can traffic with the suitor, who desires to call him, as to the value of his testimony, and then call upon the courts to enforce the contract, thus made, the tendency to evil consequence is apparent. Such a ruling leans toward the procurement of perjury; towards the raising up of a class of witnesses who, for a sufficient consideration, will give testimony that shall win or lose the lawsuit, towards the perversion of justice; and towards the corruption in our Courts."

The leading case in this area is State ex rel Spillman v. First Bank of Dickerson, 114 Neb. 423, 207 N. W. 674 and 45 A. L. R. 1418. In the Spillman case, certain fact witnesses, amenable to process sought to enforce the payment to them of $1,700. as witness fees. The original case involved the witnesses' testimony in defense of a doctor accused of murder as a result of performing an abortion. The court in discussing the contract to pay such witnesses' fees stated on page 429:

"That the amount for that purpose was to be liberal is evidenced by the placing before them at all times and under their control the $1,700.00. This agreement was not one wherein the witnesses possessed any particular skill or ability or who were to so inform themselves ... These claimants told the women [the witnesses] what they wanted the evidence for, and the women told them what

they knew. The temptation to induce lack of disclosure of all they knew, or to color or add to what they knew, was too alluring to be held to be in furtherance of justice. Its tendency is to work a denial of due process of law. It is not necessary for us to find that the intent of the contract was to procure perjury, but that the contract had the tendency and opened a strong temptation to the procurement of perjury. The tendency of such arrangements is to pervert justice, to bring courts into disrepute, and to cause a lack of confidence therein." (Emphasis added)

To the same effect, please see Dorr v. Camden, 55 W. Va. 226, 46 S. E. 1014, 65 L. R. A. 348; Clifford v. Hughes, 139 App. Div. 730, 124 N. Y. S. 478; In re Ramschasel's Estate, 24 Pa. Super. 262; Dodge v. Stiles, 26 Conn. 463; and note 30 L. R. A. N. S. 278 N. 280.

The Spillman case sets forth succinctly the contentions of petitioner. The payment of an excessive witness fee to the witness Conn caused him to perjure himself. The perjured testimony he gave was so prejudicial to petitioner's cause that its effect was to nullify all of petitioner's evidence and deny it a hearing consistent with modern concepts of due process of law. Further, the witness Conn having once testified, the Trial Court seriously erred in not allowing the proffered instruction that the fact that said witness was paid excessive compensation may be considered in determining the weight and credit to be given to his testimony. For the above reasons, petitioner did not receive a fair trial consistent with modern concepts of due process.

II

THE MASSIVE AND PREJUDICIAL PRE-TRIAL PUBLICITY ATTENDING PETITIONER'S CASE PREVENTED HIM FROM RECEIVING A FAIR TRIAL CONSISTENT WITH THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

Prior to the time of trial, the Wichita newspapers printed damaging and prejudicial accounts of the alleged arson in this case. The parties, witnesses, and their alleged acts were clearly described and identified.

The total and complete coverage given the case in the newspapers in Wichita, Kansas, not a large city, was a further example of petitioner's being denied a fair trial consistent with the due process clause of the Fourteenth Amendment.

The most recent case decided by this court involving newspaper publicity and a fair trial, was Sheppard v. Maxwell, Warden. Unofficially reported in Official Reports of the Supreme Court, Vol. 384, U. S. - Part 2, page 333. Although the case involved a criminal prosecution, the theory of the Sheppard case is applicable to the case at bar. The Sheppard case held that the massive, pervasive and prejudicial publicity attending the petitioner's prosecution prevented him from receiving a fair trial consistent with the due process clause of the Fourteenth Amendment. The case was remanded to the District Court with instructions to release the petitioner from custody unless he was tried again within a reasonable time. (A re-trial ended in a verdict of Acquittal for the petitioner.)

Your petitioner contends that the rule of the Sheppard case is applicable to the case at bar, and under said reasoning the petitioner was denied a fair trial consistent with modern concepts of due process.

CONCLUSION

The decisions below are palpably erroneous thereby preventing the petitioner from receiving a fair trial consistent with the Due Process Clause of the Fourteenth Amendment. The decisions of the courts below in the instant case raise new and undecided questions of general importance in the administration of justice which should be reviewed by this Court. The Courts below, in allowing the conduct and evidence as aforesaid departed from the usual and accepted course of judicial proceedings. For these reasons the Petition for Certiorari should be granted.

Respectfully submitted,

M. LEWIS LEHMAN
By PAUL KALLMAN

Attorneys for Petitioner

Associate Counsel:

RALPH R. FRANK
PAUL KALLMAN

BLANK

PAGE

BLANK

PAGE

APPENDIX A

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 8297 - JULY TERM, 1966

JAMAICA TIME PETROLEUM, INC.,	)	Appeal from the
Appellant,	)	United States District Court
v.	)	for the
FEDERAL INSURANCE COMPANY,	)	District of Kansas
Appellee.	)	

Fred M. Winner (Winner, Berge, Martin and Camfield and Brick, Beaty and Bonwell were with him on the brief) for Appellant.

William A. Rundle, Jr., and Byron Brainerd (Morrison, Hecker, Cozad & Morrison and Weigand, Curfman, Brainerd, Harris & Kaufman were with them on the brief) for Appellee.

Before LEWIS, BREITENSTEIN and HICKEY, Circuit Judges.

BREITENSTEIN, Circuit Judge.

Appellant-plaintiff Jamaica Time Petroleum, Inc., (insured) brought suit to recover $100,000 on an insurance policy written by appellee-defendant Federal Insurance Company (insurer) on an airplane which was destroyed by an explosion and fire. Jurisdiction is based on diversity. The case was tried to a jury which returned a verdict for the insurer and in answering specific interrogatories found that the airplane was intentionally and deliberately destroyed and that such destruction was procured by the president of the insured for the purpose of collecting the insurance.

Insured, a Kansas corporation, was organized to exploit a concession in Jamaica. Ninety percent of its stock is owned by its president, Greenbaum, and his wife. It owned a Lockheed Lodestar airplane. 1/ In February 1962, insured bought from a New Jersey airplane broker a similar Lockheed Lodestar plane together with a supply of spare parts. The total cost for this "package" was $13,500. Greenbaum obtained from the insurer a policy on the plane in the amount of $100,000. About March

---

1/ The Lockheed Lodestar is an obsolete aircraft which was manufactured in the early 1940's and for which it is difficult to obtain spare parts.

10, 1962, a pilot for the insured flew the plane to Wichita, Kansas, and parked it in the general tie-down area of the Wichita Municipal Airport near the terminal building. The plane was next flown on April 10 and the insured's pilot then left it in a remote area of the airport. Greenbaum was advised of the plane's location. On the following night an explosion occurred and the plane was destroyed.

The parties agree that the insurer has the burden of establishing the defense of arson by either direct or circumstantial evidence, 2/ and that the insurer must prove deliberate destruction for which the insured was responsible. The insured concedes that the evidence of deliberate destruction is sufficient but attacks the adequacy of the proof to show the responsibility of the insured for that destruction. We must first consider the admissibility of certain evidence.

The testimony of the witness Conn is essential to the insurer's case. When he appeared as a witness at the trial, Conn, a man with a long criminal record, was serving a 30-year term in the Kansas penitentiary under a habitual criminal charge. He was approached in the penitentiary by an attorney and an investigator for the insurer who offered him a "reward" of $1,000 "for information leading to the solution of the destruction" of the airplane. Thereafter he talked to the insurance company representatives and $1,000 was paid to his mother. Subsequently, he repeated his statements to Kansas police officers.

2/ Baltimore American Ins. Co. v. Pecos Mercantile Co., 10 Cir., 122 F. 2d 143, 147.

Conn testified that one Poulos hired him and two others to destroy the airplane, that Poulos agreed to pay him $1,500 for the job but did not do so, and that the destruction was accomplished by igniting under the airplane explosives contained in a satchel supplied by Poulos. 3/ Over the objection of the insured, Conn testified that Poulos told him that he, Poulos, was hired to have the airplane destroyed. 4/

The insured says that Conn was not a competent witness. His adjudication as a habitual criminal did not disqualify him. 5/ Conn's hope to secure a reduction in sentence and his expressed animosity to Poulos affect only his credibility - not his competence. The remaining ground for attack is the payment of the $1,000 "reward."

3/ Poulos was tried in state court for conspiracy to commit arson by setting fire to the Lodestar plane, was found guilty, and on appeal the conviction was affirmed. See State v. Poulos, 196 Kan. 253, 411 P. 2d 694.

4/ An offer by the insurer to adduce testimony from Conn that Poulos told Conn that Greenbaum hired him, Poulos, to destroy the airplane and to pay him $25,000 for such action was rejected by the district court.

5/ See Rosen v. United States, 245 U. S. 467, 471. Rule 43(a), F. R. Civ. P., makes the federal rule of competency applicable.

The rule that a nonexpert cannot enforce a promise to pay compensation for his testimony [6] because of the invitation to perjury which would contravene public policy is not pertinent here. We are not concerned with any dispute over failure to pay. Conn's mother received the $1,000.

The offer and payment of the reward were not contingent either on the testimony of Conn in court or on the outcome of any litigation. The information given by Conn related to a past event. This is a civil case. We are not concerned with decisions which deal with contingent fee agreements to produce evidence against particular persons for crimes not yet committed. [7] Keystone Driller Co. v. General Excavator Co., 290 U. S. 240, is not in point. That was an equity suit for patent infringement in which the plaintiff suppressed evidence of a prior use and the Court held that because of such suppression the plaintiff violated the clean hands doctrine. Here, the evidence was presented - not suppressed.

The payment of the reward affects the credibility of the witness and the weight to be given his testimony. These factors are not

---

6/ See Alexander v. Watson, 4 Cir., 128 F. 2d 627, 630.

7/ See Williamson v. United States, 5 Cir., 311 F. 2d 441, 444. Cf. Hill v. United States, 5 Cir., 328 F. 2d 988, cert. denied 379 U. S. 851, and United States v. Crim, 4 Cir., 340 F. 2d 989.

determinative of competence to testify. 8/ When the insurer offered and paid the reward it took a calculated risk of securing usable and believable information. The question of the credibility of Conn was for the jury and was submitted to them under instructions which are not here attacked and which we find adequate.

The insured says that Conn's testimony that Poulos told him that he, Poulos, was hired to destroy the airplane was inadmissible hearsay. Rule 43(a), F. R. Civ. P., permits the admission of evidence under the rules of the state in which a trial in a United States court is held. The trial court received the testimony under a 1964 Kansas statute 9/ which excepts from the hearsay rule "a statement which the judge finds was at the time of the assertion so far contrary to the declarant's pecuniary or proprietary interest or so far subjected him to civil or criminal liability * * * that a reasonable man in his position would not have made the statement unless he believed it to be true." The statement attributed to the declarant Poulos comes within this provision because it exposed him to both civil and criminal liability. The Kansas Supreme Court has not construed the pertinent provision of the 1964 statute. In such circumstances we accept the decision of the trial court unless clearly convinced to the

---

8/ See Brown v. United States, 9 Cir., 222 F.2d 293, 297.

9/ K. S. A. 60-460(j)

contrary. 10/ Here we are convinced that the district court correctly construed and applied the statute.

Speculation and conjecture are not enough to sustain a defense of arson. The insurer must establish by a fair preponderance of the evidence the incendiary origin and the responsibility of the insured therefor. 11/ In considering the insured's claim that it was entitled to a directed verdict, we must view the evidence and the reasonable inferences therefrom in the light most favorable to the opposing party. 12/

At the time of the purchase and destruction of the airplane the insured was in an unhealthy financial position. Its book value net worth was only $5,000 and it owed its president Greenbaum and his wife over $150,000. The insured had no use for the airplane except as a source of parts for its other plane. No effort was made for the substitution of parts and the additional parts secured from the New Jersey broker were not destroyed. Such additional parts were valued at one-half of the $13,500 paid by the insured. The $100,000

10/ Dallison v. Sears, Roebuck and Co., 10 Cir., 313 F. 2d 343, 347. See also Solomon v. Downtowner of Tulsa, Inc., 10 Cir. 357 F. 2d 449, 451.

11/ Baltimore American Ins. Co. v. Pecos Mercantile Co., 10 Cir., 122 F. 2d 143, 148.

12/ Commercial Standard Insurance Company v. Feaster, 10 Cir., 259 F. 2d 210, 212.

insurance on the plane was greatly in excess of its worth. 13/ Before the destruction, the insured tried unsuccessfully to sell the plane at a substantial profit. Although the insured presented two experts who testified that the explosion was of gasoline origin it did not offer any explanation of how the explosion occurred. The same two witnesses testified in the state criminal trial of Poulos and were paid by the insured for that court appearance.

The testimony and conduct of insured's president Greenbaum defies explanation. The insurer presented evidence that Greenbaum was seen with Poulos both before and after the explosion. Greenbaum's testimony in regard to such meetings was, at the least, evasive. Greenbaum knew of the removal of the airplane from a frequently used to a remote section of the airport. When informed of the explosion, he responded only by inquiring whether anyone was hurt. The statement of Poulos that he was hired to destroy the airplane was before the jury. Greenbaum did not deny participation or complicity in such destruction.

The record shows deliberate destruction.

13/ In this regard we recognize that the jury found in favor of the insured in answering the interrogatory relating to fraudulent overstatement of value. The evidence showed that the prior owner of the plane had it insured for $99,300 and that the other Lodestar owned by insured was insured for $125,000. The policy was a "stated amount" type particularly applicable to property in which partial loss would require extensive custom-made parts for restoration.

A motive for incendiarism is established. A connection, perhaps tenuous but none the less present, is shown between the arsonists and the president of the insured. The evidence and the reasonable inferences therefrom are sufficient to sustain the denial of the insured's motion for a directed verdict and to support the verdict of the jury. 14/

Affirmed.

14/ See British American Assur. Co. v. Bowen, 10 Cir., 134 F. 2d 256, in which a defense of arson based on circumstantial evidence was upheld.

BLANK

PAGE

APPENDIX B-1

JUDGMENT

This action came on for trial before the Court and a jury, Honorable Wesley E. Brown, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict.

It is Ordered and Adjudged that the plaintiff take nothing, that the action be dismissed on the merits, and that the defendant Federal Insurance Company recover of the plaintiff Jamaica Time Petroleum, Inc. their costs of action.

Dated at Wichita, Kansas, this 2nd day of February, 1965.

(Seal)

D. M. Quillen
Deputy Clerk of Court

Filed February 2, 1965

BLANK

PAGE

APPENDIX B-2

JUDGMENT

Thirty-Seventh Day, July Term, Wednesday, September 7th, 1966.

Before Honorable David T. Lewis, Honorable Jean S. Breitenstein and Honorable John J. Hickey, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Kansas and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of said district court in this cause be and the same is hereby affirmed.

[On October 13, 1966, the mandate of the United States Court of Appeals, in accordance with the opinion and judgment of said court, was issued to the United States District Court for the District of Kansas.]

BLANK

PAGE

LIBRARY
SUPREME COURT, U.S.

Office-Supreme Court, U.S.
FILED
JAN 3 1967
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 832

JAMAICA TIME PETROLEUM, INC.,
Petitioner,

vs.

FEDERAL INSURANCE COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

MARTIN J. PURCELL
1700 Bryant Building
Kansas City, Missouri 64106.
LAWRENCE WEIGAND
830 First National Bank Building
Wichita, Kansas 67202
Attorneys for Respondent

Associate Counsel:
WILLIAM A. RUNDLE, JR.
1700 Bryant Building
Kansas City, Missouri 64106
BYRON BRAINERD
830 First National Bank Building
Wichita, Kansas 67202
Of Counsel:
MORRISON, HECKER, COZAD & MORRISON
WEIGAND, KURFMAN, BRAINERD, HARRIS & KAUFMAN

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, HArrison 1-8080

BLANK

PAGE

INDEX

Jurisdiction 1

Statement of the Case 3

Reasons for Denying the Writ—

I. The Payment of $1,000.00 to the Mother of the Witness Conn Was Not a Witness Fee and Was for Information Only Not Contingent Either upon the Testimony of Conn in Court nor upon the Outcome of the Litigation 8

II. The Issue of Adverse Pre-Trial Publicity Is Not Supported by the Record and Not Raised in the Courts Below and May Not Be Raised Here 12

Conclusion 13

Table of Cases

Blackburn v. *Alabama*, 361 U.S. 199 8

Brown Shoe Company v. *U. S.*, 370 U.S. 294 (1962) 1

Ellis v. *Dixon*, 349 U.S. 458 (1955) 12

Helvering v. *Minnesota Tea Co*,, 296 U.S. 378 (1935) 12

Hyde v. *Shine*, 199 U.S. 62 (1904) 1

International Shoe Company v. *Washington*, 326 U.S. 310 (1945) 8

Irwan v. *Dowd*, 366 U.S. 717 8

Kinsella v. *U. S.*, 361 U.S. 234 8

Rice v. *Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955) 2

State of Kansas v. *Poulos*, 196 Kan. 253, 411 P.2d 694 (1966), cert. denied 17 L.Ed.2d 64 (1966) 11

Ullman v. *U. S.*, 350 U.S. 422 (1956) 9

United States v. *Bryan*, 339 U.S. 323 (1949) 9

Statutes

Supreme Court Rule 19 ..... 1, 2

Title 28, U.S.C., §1254(1) 1, 2

BLANK

PAGE

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 832

JAMAICA TIME PETROLEUM, INC.,
Petitioner,

vs.

FEDERAL INSURANCE COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

JURISDICTION

Jurisdiction is contended for by Petitioner under Title 28 U.S.C. §1254(1), but granting of the Writ is discretionary with the Court and not a matter of right. *Hyde* v. *Shine*, 199 U.S. 62 (1904); Supreme Court Rule 19(1). Inquiry as to jurisdiction is appropriate in every case. *Brown Shoe Company* v. *U. S.*, 370 U.S. 294 (1962).

Respondent submits that jurisdiction as granted by 28 U.S.C. §1254(1) is to be exercised within the framework of Supreme Court Rule 19, which provides in part:

> "A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are *special and important* reasons therefor. . . ." (Emphasis supplied)

There is no showing here of a "special" or "important" reason invocational of jurisdiction. This was, and remains, a private dispute between private corporate parties concerning a private matter in which there is no public interest. Neither is there presented by the Petitioner in its jurisdictional claim any reasons characteristic of those contained in Rule 19(1)(a) and (b) to bring this case within the jurisdiction of this Court.

In dismissing the Writ in *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955), Mr. Justice Frankfurter stated, 349 U.S. at 73:

> "This Rule [Rule 19], formulated 30 years ago, embodies the criteria, developed ever since the Evarts Act of 1891, by which the Court determines whether a particular case merits consideration, with due regard to the proper functioning of the limited reviewing power to which this Court is confined, decisively restricted through the creation of the intermediate Courts of Appeals and more largely confined by the Judiciary Act of 1925. . . .'

and further, 349 U.S. at 74:

> ". . . But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. . . ."

and further, 349 U.S. at 79, (quoting Mr. Chief Justice Taft in an earlier case):

". . . it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, . . ."

STATEMENT OF THE CASE

Being of the opinion that Petitioner's (Plaintiff and Appellant below) Statement presents some inaccuracies and only a portion of the facts necessary to a complete understanding of the case by the Court, Respondent hereinafter sets forth a supplemental statement.

The corporate Petitioner, Jamaica Time Petroleum, Inc., was formed in 1938 (R. 53) or 1959 (R. 78) as a "closed corporation" (R. 78) with an issue of one thousand shares of stock, nine hundred shares of which were owned by Rudolph R. Greenbaum and his wife (R. 53). Aside from the Greenbaums there were only two other stockholders (R. 53). This was still the situation as of April 12, 1962 (R. 53), the date of the destruction of the aircraft in question. The Petitioner corporation was specifically formed to acquire and explore an oil and gas concession on the Island of Jamaica (R. 53, 79). This did not prove to be a successful operation (R. 53, 79) and the concession expired in 1963 (R. 53, 80). The loss to Petitioner was One Hundred Thirty-Eight Thousand Dollars ($138,000.00) (R. 80) and was claimed as a loss in the amount of One Hundred Thirty-Five Thousand Three Hundred Forty-Three and 29/100 Dollars ($135,343.29) for income tax purposes in 1963 (R. 81). In the meantime, Mr. Greenbaum and his wife had loaned the Petitioner corporation One Hundred Fifty-Three Thousand Dollars ($153,000.00) (R. 54). As of April 12, 1962, the date of the destruction of the aircraft, the book value net worth of the Petitioner was Five Thousand Dollars ($5,000.00) (R. 54, 81).

In the fall of 1961, Petitioner purchased a Lockheed Lodestar airplane (R. 47, 55) *which is not the airplane which is the subject of this litigation* (R. 55). This airplane was used in Petitioner's business and at least as of the time of trial was still owned and used by Petitioner (R. 55). However, early in 1962, Petitioner, through Greenbaum, using money borrowed from his wife (R. 85), purchased a second Lockheed Lodestar airplane (R. 49), *the aircraft with which we are concerned here and for which Petitioner had no operational use whatsoever* (R. 55, 84).

Following the purchase Greenbaum contacted an insurance brokerage firm at Wichita and requested a One Hundred Thousand Dollar ($100,000.00) insurance policy on this airplane (R. 67-70, 156), and represented the worth of the aircraft to be in that amount (R. 157). Ordinarily Petitioner's insurance affairs were handled by another corporate officer, Mr. Loux (R. 69), but this insurance transaction was handled by Greenbaum personally (R. 69). It was Greenbaum's suggestion that a One Hundred Thousand Dollar ($100,000.00) policy be obtained (R. 70, 87, 157) and this was accomplished by a Mr. Hill of the Wichita insurance firm through an aviation insurance management company, Associated Aviation Underwriters (R. 88), who placed the coverage with Defendant. According to Associated Aviation Underwriters, Mr. Hill represented the purchase price as One Hundred Thousand Dollars ($100,000.00) (R. 89, 90). The spare parts were trucked to Wichita (R. 61) and separately insured for Thirty Thousand Dollars ($30,000.00) (R. 62).

The aircraft in question (the second Lockheed Lodestar) was purchased by Greenbaum with his wife's money (R. 85) from Manufacturers Hanover Trust in New York (R. 27, 56) through an aircraft broker, one Mr. Wilmer

D. Crawford of Teterboro, New Jersey, whose deposition was read into evidence by Petitioner (R. 26-34). The airplane was never seen nor inspected by Greenbaum prior to purchase and its arrival in Wichita (R. 61). This aircraft originally had been manufactured for the military (R. 27) and was at least twenty years old at the time of purchase by Greenbaum (R. 28). It "could be actually considered in the nature of an antique. It was an outmoded airplane and out of manufacture even to the point of spare parts now being somewhat of a problem for the airplane since they are out of new manufacture" (R. 32). Nothing had been done to upgrade the airplane since 1947 (R. 31) and it was obsolete (R. 32).

The aircraft was offered for sale together with a large quantity of spare parts (R. 31) as a package (R. 61) and the entire package was purchased by Greenbaum for Thirteen Thousand Five Hundred Dollars ($13,500.00 (R. 31, 61). Half of the purchase price should be allocated to the airplane and half to the spare parts (R. 31). According to Mr. Bangiola, Greenbaum's pilot, "at least seventy-five percent" of the spare parts, including two remanufactured engines, were usable on the first aircraft (R. 92-93) purchased by Petitioner and which Petitioner was still using at the time of trial (R. 55), but Petitioner had no use for the second airplane itself (R. 55, 84). It was Greenbaum's further testimony that the aircraft in question had "excellent guidance gear and electronics" (R. 55) which he expected to install in his first aircraft (R. 55-56) but it was his pilot's testimony that such an exchange would be a "waste of money" (R. 94). It was the further testimony of the pilot that the spare parts acquired in the purchase were worth Twenty-Five Thousand Dollars ($25,000.00) (R. 95) or Fourteen Thousand Dollars ($14,000.00) to Fifteen Thousand Dollars ($15,000.00) (R. 96). It was the pilot's idea to

keep the spare parts and sell the airplane (R. 96) . Spare parts for Lockheed Lodestars were difficult to obtain at that time (R. 93). Greenbaum denied that the aircraft was offered by Petitioner for sale generally (R. 62) but he was contradicted in this by his pilot who stated that it was placed in the hands of a broker for re-sale at a price of Twenty-Five Thousand Dollars ($25,000.00) and that this was authorized by Greenbaum (R. 96). He was further contradicted in this by his answer under oath to Respondent's pre-trial interrogatories wherein he had stated, "The aircraft was offered for sale" (R. 63-65). A period of time of one month elapsed between the arrival of the airplane in Wichita from New Jersey and its destruction on the night of April 12, 1962 (R. 96). During this period the aircraft was not used on company business and no removal of radio equipment was attempted (R. 96). The airplane merely remained parked in the general tie-down area at the Wichita Municipal Airport near the Municipal terminal building (R. 96). Actual use of the airplane was never discussed between Greenbaum and his pilot (R. 97). It was just a matter of reselling it (R. 97).

A day or two before the aircraft was destroyed it was flown around the field for the first time since its arrival in Wichita (R. 96) and engine trouble developed (R. 97). It was landed and taken to a place in front of a hangar (R. 97) in a very deserted and dark area of the field (R. 98) where it was destroyed the following night (R. 97). Greenbaum had been advised by the pilot as to the aircraft's location (R. 97), a fact that Greenbaum could not "remember" at the trial (R. 72). On the night of the destruction the pilot was called to the scene and upon seeing the burning aircraft, so advised Greenbaum at his home by telephone who responded only by asking if anyone was hurt (R. 98). At no time on the night of the destruction

or at any time later did Greenbaum visit the scene or view the airplane (R. 61, 99).

That the Respondent produced sufficient evidence of the deliberate destruction of the aircraft was conceded by Petitioner at page 8 of its Brief filed in the Court of Appeals, which concession is recognized and accepted in the opinion of the Court of Appeals, *Jamaica Time Petroleum, Inc.* v. *Federal Insurance Company,* 366 F.2d 156 (1966). The deliberate destruction was further confirmed by Captain Bevis of the Wichita Police Department (R. 112) and Eldon A. Means, a consulting chemist (R. 115). It was the testimony of one Rex Rudolph Conn (R. 115-154) that he was engaged by one George Poulos, a "local hoodlum" or "underworld character" (R. 105), in concert with one Eugene McCroskey, an ex-convict (R. 106), and one James Dolan, a known criminal (R. 106, 121), to destroy the airplane (R. 120). This they accomplished by lighting a fuse protruding from a satchel which they had placed under the airplane (R. 121-122, 127-128). Subsequently McCroskey and Conn pleaded guilty to the destruction (R. 106) and Poulos was convicted of the same in the District Court of Sedgwick County, Kansas, which conviction was affirmed by the Supreme Court of Kansas. *State* v. *Poulos,* 196 Kan. 253, 411 P.2d 694 (1966), cert. denied 17 L.Ed.2d 64 (1966). Respondent offered to prove by the witness Conn that George Poulos had been hired by Greenbaum to have the aircraft destroyed for a sum of Twenty-Five Thousand Dollars ($25,000.00) (R. 136) but was not permitted to do so by the District Court (R. 123-127).

Petitioner's assertion "Conn was paid $1,000.00 to testify" is not supported by the record. The record does reveal that during its investigation into the destruction, Respondent offered to pay Conn's mother the sum of One Thousand Dollars ($1,000.00) in the event Conn would give

any information he had leading to a solution of the destruction of the aircraft (R. 117, 118) which was eventually done (R. 118). Thereafter Conn was asked to relate his information to the Wichita police, which he did (R. 118) and only thereafter was he asked to testify (R. 119). As late as forty-eight hours before Conn's appearance as a witness he was again advised by counsel that he was under no compulsion to testify (R. 153). That the District Judge found nothing improper with respect to the payment of the money in return for information is amply set forth in the record (R. 24-25, 127). In its opinion on this point the Court of Appeals states, 366 F.2d at 158: "The offer and payment of the reward were not contingent either on the testimony of Conn in Court or on the outcome of any litigation."

REASONS FOR DENYING THE WRIT

I

The Payment of $1,000.00 to the Mother of the Witness Conn Was Not a Witness Fee and Was for Information Only Not Contingent Either upon the Testimony of Conn in Court nor upon the Outcome of the Litigation

While Respondent has no quarrel with the law relative to due process cited by Petitioner under Section I-A of its Petition (p. 9) Respondent does respectfully submit that the authorities therein cited have no application to this case. *International Shoe Company* v. *Washington,* 326 U.S. 310 (1945) cited by Petitioner (p. 9) treated with the application of a process statute of the State of Washington to a foreign corporation. The three remaining cases cited at page 10 of the Petition (*Kinsella* v. *U. S.*, 361 U.S. 234; *Irwan* v. *Dowd,* 366 U.S. 717; *Blackburn* v. *Alabama,* 361 U.S. 199) are criminal cases. Such law is hardly applicable to the case at bar.

At Section I-B of its Petition (pp. 10-11) the Petitioner apparently asserts, and would have this Court believe, that witnesses may be compelled to testify even adversely to themselves and cites in support *United States* v. *Bryan*, 339 U.S. 323 (1949), and *Ullman* v. *U. S.*, 350 U.S. 422 (1956). These cases do not support the proposition contended for by Petitioner in that the *Bryan* case recognizes that witnesses do enjoy some exemption and privilege from testifying and the *Ullman* case involves the privilege afforded by the Fifth Amendment.

Petitioner claims that witnesses (presumably including Conn in this instance) may be compelled to appear and testify but even Petitioner must recognize that here it would be legally impossible to compel Rex Conn to testify against himself with respect to his participation in the destruction of the aircraft in question. The fact is that he did comply with Petitioner's "Duty to Testify" by voluntarily appearing in open Court without inducement of any kind (R. 117-119, 163) and submitted himself to criminal prosecution (R. 119) thus lending further support to his credibility.

Petitioner seeks to convince this Court that Conn was "paid to testify" and that he gave "perjured testimony" by bald statements to this effect wholly unsupported by the Record, when the fact is that the Record is replete with testimony, findings and judicial opinion to the contrary (R. 24-25, 117-119, 127, 153). On this point the trial judge stated to Petitioner's trial counsel (R. 127):

> ". . . with respect to what counsel has done in this case, I say to you very frankly that I see nothing wrong with what in an effort to obtain knowledge of this, of the conduct which has so far been disclosed to me and I say that to you because there are some portions of part of one of your briefs which you ask to withdraw and which I permitted you to do, . . ."

In this same respect the Court of Appeals for the Tenth Circuit stated, 366 F.2d at 158:

> "The offer and payment of the reward were not contingent either on the testimony of Conn in Court or on the outcome of any litigation.
>
> * * *
>
> ". . . When the insurer offered and paid the reward it took a calculated risk of securing usable and believable information."

Under Section I-C of the Petition (p. 12) it is contended that the Writ should issue because of the "Effects Of The Payment Of Excessive Compensation To A Non-Expert Witness." In purported support of this proposition Petitioner cites numerous cases all of which involve contracts with persons to testify in litigation. To prove that no such contract existed here and that Petitioner's authorities are not in point, Respondent respectfully invites the Court's attention to the words of Judge Breitenstein as contained in the affirming opinion of the Court of Appeals for the Tenth Circuit in this case, 366 F.2d at 158:

> "The rule that a non-expert cannot enforce a promise to pay compensation for his testimony because of the invitation to perjury which would contravene public policy is not pertinent here. We are not concerned with any dispute over failure to pay. Conn's mother received the $1,000.00.
>
> * * *
>
> ". . . The information given by Conn related to a past event. This is a civil case. We are not concerned with decisions which deal with contingent fee agreements to produce evidence against particular persons for crimes not yet committed. . . ."

Whether or not petitioner sees fit to recognize it, the only possible attack upon the witness Conn must be limited to (1) competency under the Kansas statutes, and (2) credibility.

The Kansas Supreme Court, in one of the criminal prosecutions which arose out of the destruction of this airplane, *State of Kansas* v. *Poulos,* 196 Kan. 253, 411 P.2d 694 (1966), cert. denied 17 L.Ed.2d 64 (1966), in quoting a portion of and construing K.S.A. 60-407 stated:

> "Except as otherwise provided by statute (a) every person is qualified to be a witness. . . ."
>
> "This section is the keystone of the entire system of Rules of Evidence provided in Article 4 of the Code of Civil Procedure. It abolishes all pre-existing disqualifications and privileges of witnesses and wipes the slate clean of all other exclusionary rules, leaving the one requirement for the admissibility of evidence, that of relevance. If the evidence is relevant to the issue being investigated, the jury is permitted to receive it, unless some other rule of exclusion or privilege, as announced in Article 4 or other statutes, causes the evidence to be excluded. (4 Vernon's Kansas Code of Civ. Proc., pp. 198, 199.) Under this section, a witness is presumed to be competent to testify. His incompetency, therefore, must be challenged and the burden of establishing incompetency rests on the challenger. (4 Vernon's Kansas Code of Civ. Proc., p. 269.)"

Conn's credibility as a witness was for the jury to determine under a proper instruction, which appears in the Record at page 167. As is pointed out in the opinion of the Court of Appeals for the Tenth Circuit in this case, 366 F.2d at 158:

> "The question of the credibility of Conn was for a jury and was submitted to them *under instructions which are not here attacked and which we find adequate.*" (Emphasis supplied).

II

The Issue of Adverse Pre-Trial Publicity Is Not Supported by the Record and Not Raised in the Courts Below and May Not Be Raised Here

In Section II of its Petition (p. 15) Petitioner claims *for the first time* that it was precluded from a fair trial by adverse pre-trial publicity. Issuance of the Writ on those grounds should be denied for the following enumerated reasons:

1. The Record in this case does not contain any evidence of such pre-trial publicity.

2. The Record in this case does not contain any objection by Petitioner to proceeding to trial at Wichita, Kansas.

3. The Record in this case does not contain any objection by Petitioner during the course of the trial to proceeding further with the trial.

4. Petitioner's Motion for a New Trial does not raise the issue of adverse publicity either prior to or during the trial (R. 19).

5. Petitioner did not raise the issue of prejudicial pre-trial publicity in its appeal to the Court of Appeals for the Tenth Circuit.

In view of the above stated facts, Respondent respectfully invokes the long standing rule of this Court that Petitioner may not raise an issue now to its benefit not previously raised in the Courts below. *Ellis* v. *Dixon*, 349 U.S. 458 (1955); *Helvering* v. *Minnesota Tea Co.*, 296 U.S. 378 (1935).

CONCLUSION

Respondent submits that this case is and was a controversy of "fact" between two private corporations, not involving a question of public importance, which was decided by a jury in a United States District Court adversely to Petitioner and affirmed on appeal by the United States Court of Appeals for the Tenth Circuit. The case was carefully tried and reviewed by the District Court and extensively briefed for and reviewed by the Court of Appeals. On the jury findings and the judicial reviews already had Petitioner neither merits nor is entitled to the granting of a Writ of Certiorari and its Petition herein raises nothing further for review by this Court.

Respectfully submitted,

MARTIN J. PURCELL
1700 Bryant Building
Kansas City, Missouri 64106
LAWRENCE WEIGAND
830 First National Bank Building
Wichita, Kansas 67202
Attorneys for Respondent

Associate Counsel:

WILLIAM A. RUNDLE, JR.
1700 Bryant Building
Kansas City, Missouri 64106
BYRON BRAINERD
830 First National Bank Building
Wichita, Kansas 67202

Of Counsel:

MORRISON, HECKER, COZAD & MORRISON
WEIGAND, KURFMAN, BRAINERD, HARRIS & KAUFMAN

BLANK

PAGE

Office-Supreme Court, U.S.
FILED
JAN 12 1967
JOHN F. DAVIS, CLERK

PETITIONER'S REPLY BRIEF
No. 832

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1966

JAMAICA TIME PETROLEUM, INC.,

Petitioner,

vs.

FEDERAL INSURANCE COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITIONER'S REPLY BRIEF

M. LEWIS LEHMAN
By PAUL KALLMAN
4307 Crenshaw Boulevard
Los Angeles, Calif. 90008

Attorneys for Petitioner

ASSOCIATE COUNSEL

RALPH R. FRANK
PAUL KALLMAN
9460 Wilshire Boulevard
Suite 427
Beverly Hills, California

Attorneys for Petitioner

BLANK

PAGE

SUBJECT INDEX

		Page
I.	RESPONDENT'S JURISDICTIONAL ARGUMENT	1
II.	RESPONDENT'S FACTUAL ARGUMENT	2
III.	RESPONDENT'S LEGAL ARGUMENT	6
IV.	CONCLUSION	9

TABLE OF AUTHORITIES CITED

Cases

Blackburn v. Alabama, 361 U. S. 199, 4 L. Ed. 2d 243, 80 S. Ct. 274 — 7

Jamaica Time Petroleum v. Federal Insurance Company, 366 F. 2d 156 — 5, 8

State ex rel Spillman v. 1st Bank of Dickerson, 114 Neb. 423, 207 N. W. 674, 45 A. L. R. 1418 — 6, 7

Constitution

United States Constitution, 14th Amendment — 5, 6

Rules

Rule 19(1)(a) — 2

Rule 19(1)(b) — 2

BLANK

PAGE

PETITIONER'S REPLY BRIEF

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1966
No. 832

JAMAICA TIME PETROLEUM, INC.,

Petitioner,

vs.

FEDERAL INSURANCE COMPANY,

Respondent.

PETITIONER'S REPLY BRIEF

Petitioner hereby replies to Respondent's Brief in Opposition to Petitioner's Petition for Writ of Certiorari.

I

RESPONDENT'S JURISDICTIONAL ARGUMENT

Petitioner recognizes Respondent's statement that review on certiorari is a matter of

sound judicial discretion to be exercised within the framework of Rule 19(1)(b) [19(1)(a) is not applicable to the case at bar though Respondent so urges] and contends that Petitioner has amply demonstrated that the Tenth Circuit Court of Appeals has decided an important question of law which has not been, but should be, settled by this Court and has sanctioned such a departure by the Trial Court as to call for an exercise of this Court's power of supervision, all as set forth in the Petitioner's Petition for Writ of Certiorari.

The questions of due process involved in (1) whether a non-expert witness amenable to process who was paid excessive witness fees is competent to testify, (2) whether after such witness has testified, petitioner was not entitled to an appropriate instruction, (3) the Trial Court's condonation of such practices, and (4) whether Petitioner received a fair trial in view of the pretrial publicity, are all important questions of federal law of the type contemplated by Rule 19(1)(b).

The denial of a review by this Court would amount to complete condonation of such unfair, unjust, lacking in due process practices.

II

RESPONDENT'S FACTUAL ARGUMENT

Petitioner contends that respondent's rehashing of the facts is little, if any, value to this Court in deciding the legal questions

presented. Respondent presents the specious argument that the jury verdict is probably supported by factual evidence and therefore a review by the Supreme Court is unnecessary. This totally overlooks the true legal questions of due process presented. Respondent's argument of the facts has no relation to the legal questions presented but manifests the concept that expediency must replace a review by this Court to effect due process of law.

The facts relevant to the questions presented are simple.

REX CONN, an adjudged habitual criminal, was paid $1,000 by attorneys and representatives of the Respondent to testify. He instructed Respondent to deliver the money to his mother. Witness CONN first denied knowledge of the alleged arson until the $1,000 "offer of reward for information" was made. It appears that the first inquiries made of witness CONN leading to the "reward for information" produced no information. When $1,000.00 for such information was offered, witness CONN then remembered the alleged arson. He then received his reward. The alleged "reward" of $1,000.00 paid to witness CONN was non-public and non-publicized. Its conception was accomplished by the respondent's lawyer and investigator at their meeting at the penitentiary with habitual criminal CONN, their most vital witness.

Witness CONN, whose testimony in the words of Circuit Judge Breitenstein "is essential to the insurer's case," testified at the time of trial over continual objection of Petitioner. No instruction was given as requested, though the jury should have considered such payment to

witness CONN in judging his credibility. Witness CONN had expressed animosity towards GEORGE POULOS. Witness CONN in the subsequent criminal arson trial of POULOS pled guilty to arson. Witness CONN at said trial was already serving a ten to thirty year sentence as an habitual criminal and was told that the sentence for arson would try to run concurrently, which it did.

Contrary to the respondent's argument that Witness CONN is to be believed because he was possibly testifying against his own interest, the true facts are that witness Conn was in prison as an habitual criminal and by testifying for the respondent he had nothing to lose. Additionally, he had hopes of a reduction in sentence as an habitual criminal. His arson sentence ran concurrently and he received $1,000 which he gave to his mother. It takes little imagination to think of an habitual convict or two who would testify to anything for $1,000.

Petitioner respectfully urges that the alleged $1,000 reward which respondent charitably paid to witness CONN was in truth and in fact a "bribe" or "pay-off" to a witness which in the end accomplished for the respondent the successful defense of an insurance claim for $100,000. The record does not disclose whether this $1,000 was paid in cash but it does reflect that the payment by the respondent insurance company's lawyer and investigator was not made directly to witness CONN, but surreptitiously, to his mother.

To contend that "the offer and payment of the reward were not contingent either on the testimony of CONN in Court or on the outcome of

any litigation" 1/ and "when the insurer offered and paid the reward it took a calculated risk of securing usable and unbelievable information" 2/ strains common sense, for the following reasons:

(1) Why did Respondents seek such information from witness CONN if the end result would not be its introduction into evidence either directly or by deposition at the time of trial? How else could such information be of value to the Respondents?

(2) Respondent's calculated risk must have been minimal. The first no reward request for information from witness CONN produced nothing; the second time accompanied by the "reward" witness CONN was found to have possession of usable and believable information, which suddenly manifested itself when respondent arranged to pay the $1000.00.

Additionally massive and pervasive pretrial publicity preceded the trial in this matter.

The above facts are relevant to the issues presented. Upon these facts rests the overriding issue of whether under these circumstances Petitioner received a fair trial consistent with the due process clause of the 14th Amendment.

Respondent continually placed before this Court and the Circuit Court of Appeals, its offer

---

1/ Jamaica Time Petroleum v. Federal Insurance Company, 366 F. 2d 156.

2/ Ibid

to prove by witness CONN that GEORGE POULOS was hired by petitioning president to have the subject aircraft destroyed for $25,000. The trial Court refused this offer of proof. Its improper reassertion at each appellate stage is another eloquent example of respondent's practices throughout the trial.

With all of the Respondent's innuendoes and accusations, the plain facts are that Petitioner's president has never been indicted, charged or accused of conspiracy, complicity, or any connection whatsoever with the alleged arson by the Wichita police or by any authorized police authority.

III

RESPONDENT'S LEGAL ARGUMENT

Petitioner's reasons for granting the writ are simple. Petitioner was denied a fair trial consistent with the due process clause of the 14th Amendment because: (1) Witness CONN, a non-expert witness amenable to process, having been paid excessive witness fees to testify, gave highly prejudicial and false testimony, the effect of which was to nullify all of Petitioner's evidence and thereby deprive Petitioner of due process of law. (2) Having so testified, Petitioner was entitled to an appropriate jury instruction that "the law does not authorize the payment to law witnesses in excess of ordinary witness fees, and if a witness has been so paid, that fact may be considered in determining the weight and credit to be given to his testimony? (3) Even assuming for the sake of argument only, that witness CONN spoke the truth, there was still a denial of due process since the leading case, State ex rel Spillman v. 1st Bank

of Dickerson, 114 Neb. 423, 207 N. W. 674 and 45 A. L. R. 1418 holds that ...

> " ... its tendency [payment of excessive witness fees to a non-expert witness amenable to process] is to work a denial of due process of law. It is not necessary for us to find that the intent of the contract was to procure perjury, but that the contract had the tendency and opened a strong temptation to the procurement of perjury. The tendency of such arrangements is to pervert justice, to bring courts into disrepute, and to cause a lack of confidence therein." (Emphasis added)

And Blackburn v. Alabama, 316 U. S. 199, 4 L. Ed. 2d 243, 80 S. Ct. 274 holds the due process clause of the 14th Amendment forbids fundamental unfairness in the use of evidence, whether true or false.

Is not such conduct so reprehensible that its effect is to deny due process of law and should not this Court condemn such conduct and prevent its future repetition? If such conduct were allowed to continue the concept of due process would be meaningless.

Respondent's argument and the opinion of the 10th Circuit Court of Appeals does not face the problem or answer the question. Is the theory, reasoning, purpose, rule and significance behind the rule of the cases holding that a non-expert witness cannot enforce a promise to pay excessive compensation applicable to the case at bar or is it not? It begs to the question to say that it does not because "we are not concerned with any dispute over failure to pay.

CONN's mother received the $1,000." [3/] The reasoning and purpose of such cases is to prevent and discourage such conduct in a courtroom because it contravenes public policy and has a tendency to work a denial of due process of law, whether or not such question arises when the witness sues for his excessive compensation or such as in the case at bar. The goal to be reached is the same -- prevention of such conduct.

If such conduct is not reprehensible, unfair and violative of due process, then Petitioner admits its Petition for Writ of Certiorari is unmeritorious.

Respondent argues that the law cited by the Petitioner in Section 1-A of its Petition is not applicable because, the cases were either criminal cases or, as in the International Shoe Company case, treated with the application of a process statute of the State of Washington to a foreign corporation, is an attempt to confine every legal authority to its specific facts. If such application of authorities prevailed, no prior Court holding would ever be applicable to a subsequent litigation.

What Respondent overlooks is that the issues are the same even if the facts are not the same. If the issues are the same, then the precedents are applicable regardless of the factual situation.

Petitioner respectfully submits that the

3/ Jamaica Time Petroleum, Inc. v. Federal Insurance Company, 366 F. 2d 156.

cases cited in its Reasons for Granting the Writ are applicable to the case at bar and should be so applied by this Court.

With respect to pretrial publicity preventing a fair trial consistent with due process, this concept is in its infantcy. Petitioner contends that such pretrial publicity had a substantial adverse effect on Petitioner's receiving a fair trial and, therefore, should be considered by this Court.

IV

CONCLUSION

For the foregoing reasons, as well as those which have been urged in the Petition, certiorari should be granted.

Respectfully submitted,

M. LEWIS LEHMAN
By PAUL KALLMAN

Attorneys for Petitioner

Associate Counsel:

RALPH R. FRANK
PAUL KALLMAN